

The Honorable Michael H. Simon

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

AMERICAN RIVERS, et al.,  
Plaintiffs,  
and  
STATE OF OREGON, et al.,  
Intervenor-Plaintiffs  
v.  
NATIONAL MARINE FISHERIES  
SERVICE, et al.,  
Defendants,  
and  
NORTHWEST IRRIGATION UTILITIES,  
et al.,  
Intervenor-Defendants.

NO. 3:01-CV-640-SI

STATE OF WASHINGTON'S  
MOTION TO WITHDRAW  
AS DEFENDANT-INTERVENOR  
AND FOR LEAVE TO  
PARTICIPATE AS *AMICUS*  
*CURIAE*

**I. RELIEF SOUGHT**

This Court's April 2, 2021, case schedule order provides that, by: "April 19, 2021: any existing Intervenor or amicus curiae proposing a change of status that requires the Court's

1 permission, and any new party that seeks to intervene in this case, shall file an appropriate  
2 motion ...”

3 Through this motion, Washington provides notice that it does not intend to participate  
4 as an intervening defendant with respect to the amended complaints filed herein. If an order  
5 dismissing the State as a formal party to this litigation is needed, that action is requested.

6 At the same time, Washington seeks leave of this court to continue participating in this  
7 matter as *amicus curiae*.<sup>1</sup>

## 8 II. BASIS FOR REQUESTED RELIEF

9 This case has been the vehicle for plaintiffs to serially challenge operation of the  
10 Federal Columbia River Power System (FCRPS) within the context of records of decision by  
11 federal action-agencies, corresponding Endangered Species Act biological opinions, and  
12 associated National Environmental Protection Act assessments. This case has been maintained  
13 through numerous remands, each displacing prior actions and decisions, followed by amended  
14 petitions/complaints. The effect of that procedure has been that intervenors and/or amici have  
15 been carried forward from one case to another absent some affirmative action re-aligning their  
16 status or participation.

17 This motion clarifies Washington’s desired participation in this case now that renewed  
18 judicial review will be undertaken for new decisions by federal action-agencies, along with  
19 new ESA and NEPA determinations under review.

20 Washington does not intend to participate as a defendant-intervenor with regard to any  
21 of the amended complaints that have been filed. Because Washington remains listed as a  
22 defendant-intervenor, but is not a necessary defendant party, simply dropping Washington  
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24 <sup>1</sup> In accordance with LCR 7, Washington provided all parties and *amici* with advance notice of its  
25 intended motion and requested that any opposition or concerns over the requested relief be shared with  
26 Washington to see if any pre-motion coordination was needed. Plaintiffs National Wildlife Federation, and the  
State of Oregon, responded that they do not oppose the motion. Federal Defendants have similarly indicated they  
do not oppose the motion, as have various other defendant-intervenors and amici. While not every party and/or  
*amicus* has responded, no entity has expressed concern or objection.

1 from the full caption may be sufficient. To the extent an order formally dismissing  
 2 Washington State as a defendant-intervenor is needed, or desired, Washington requests that  
 3 such an order be issued.

4 While Washington does not desire to participate as a party, the State continues to have  
 5 a significant interest in the subject matter of this litigation. Accordingly, the State would like  
 6 to participate as *amicus curiae*.

7 Washington's ongoing interest in this matter is reflected in prior filings wherein the  
 8 State was granted leave to intervene (*See e.g.* Dkt. 1514 – State of Washington's Memorandum  
 9 in Support of Unopposed Motion for Leave to Intervene as Defendant, at 1-4). Prior to that,  
 10 Washington had been granted leave to participate as amicus based upon its substantial interest  
 11 in the natural resources affected by operation of the FCRPS. *See* Dkt. 178.

12 Throughout this case, Washington has participated in the regional collaboration of  
 13 sovereigns that possess management expertise and responsibility for the natural resources  
 14 affected by the FCRPS – a collaboration that was crystalized and given added gravitas by this  
 15 Court's prior remand orders.

16 In connection with the latest remand, the federal action-agencies formally designated  
 17 Washington State as a "cooperating agency" for purposes of conducting NEPA on the FCRPS  
 18 operations. Washington also played an active and significant role in negotiations over FCRPS  
 19 spill operations during the remand period.

20 Going forward, Washington will continue participating in regional collaboration and  
 21 discussions geared to address further refinement of FCRPS operations. While the State  
 22 recognizes the substantial work undertaken, and the progress that has been made to evolve  
 23 FCRPS operations, and the associated environmental review, the State looks forward to  
 24 continued collaboration to further improve operations as part of a comprehensive plan  
 25 addressing the needs of listed salmon and Southern Resident Killer Whales. Washington  
 26 anticipates the need for greater refinement of medium to long-term operations that improve

1 productivity of Columbia Basin salmonids, along with measures that provide additional focus  
 2 on the upper Columbia River portion of the FCRPS action area. These perspectives are  
 3 reflected, in part, within Washington comments on the Columbia River System Operations  
 4 Draft Environmental Impact Statement.

5 Given this outlook, Washington feels it can best contribute to the current litigation as  
 6 *amicus curiae*. In particular, Washington intends to participate as unaligned *amicus*.  
 7 Accordingly, if allowed to participate, Washington will only file briefs where it has a  
 8 perspective it believes may add to, and assist this Court in resolving issues as they arise,  
 9 informed by Washington's continuing work within the regional collaboration.

10 This Court's scheduling order specifically contemplates a role for unaligned *amicus*  
 11 and makes room for such briefing. Because the scheduling order already anticipates such  
 12 participation, granting Washington's request for leave to participate on that basis will not  
 13 prejudice any party, delay matters, or unreasonably add complexity to this case.

### 14 III. CONCLUSION

15 Based upon the foregoing, Washington respectfully requests an order removing the  
 16 State as defendant-intervenor, and granting the State's request for leave to participate as an  
 17 unaligned *amicus curiae* on the terms set forth in this Court's scheduling order.

18 DATED this 19th day of April, 2021.

19 ROBERT W. FERGUSON  
 20 Attorney General

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 19, 2021, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 19th day of April 2021, at Lacey, Washington.

s/Diane Newman

DIANE NEWMAN

Legal Assistant